

June 1 2010

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA**IN THE SUPREME COURT OF THE STATE OF MONTANA****DA 10-0161**

JUN 11 2010

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CLERK OF THE SUPREME COURT
STATE OF MONTANA

BNSF RAILWAY COMPANY,
Appellant/Petitioner,

vs.

CHAD CRINGLE and MONTANA DEPARTMENT OF LABOR, HUMAN
RIGHTS COMMISSION,

Appellees/Respondents.

Re: District Court Case No.: BDV-2009-1016

**BNSF'S MOTION FOR RELIEF FROM DISTRICT COURT'S ORDER
DENYING ITS MOTION FOR STAY OF EXECUTION OF JUDGMENT
AND REQUEST FOR APPROVAL OF SUPERSEDEAS BOND**

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COMES NOW Appellant BNSF Railway Company ("BNSF") and files this motion for relief from the District Court's May 21, 2010, Order denying BNSF's Motion for Stay of Execution of Judgment Pending Appeal and Request for Approval of Supersedeas Bond. M.R.App.P. 22(2). BNSF has contacted counsel for Cringle and the Department of Labor to give them notice of this motion. Counsel for Cringle objects, and as of the filing of the motion BNSF has not heard back from counsel for the Department.

Summary and Request For Relief

Believing that it lacked jurisdiction over BNSF's request for review of an agency dismissal order, the District Court granted petitions to enforce an earlier agency order and, accordingly, entered judgment against BNSF. BNSF has appealed the District Court's rulings and seeks a stay from this Court during the appeal. Because the claimant is adequately protected by post-judgment interest and the supersedeas bond BNSF obtained, because BNSF likely will not be able to recover the monetary relief ordered should it eventually prevail in this dispute, and because there are substantial questions as to the correctness of the District Court's ruling, a stay of enforcement during the pendency of this appeal is appropriate.

Background

Appellee Chad Cringle filed a Charge of Discrimination with the Department of Labor and Industry (the "Department"). The Department eventually entered a Hearing Officer's Decision and served a Notice of Decision of Hearing

Officer on September 2, 2009. Upon receipt at BNSF's counsel's offices, the Notice of Decision was either misfiled or otherwise misplaced, and the time in which to appeal to the Human Rights Commission (the "HRC") was not placed on counsel's calendar.

Immediately upon learning of this mistake on September 22, 2009, counsel for BNSF filed a notice of appeal along with a request for an extension of time to appeal. On October 5, 2009, the HRC issued an order denying BNSF's request for an extension and dismissing its appeal (the "HRC Dismissal Order"). *See* Ex. "A". The HRC dismissed because BNSF's appeal to the HRC was filed outside the 14-day period allowed by statute for such internal appeals, and the HRC, as it has confirmed in District Court proceedings, believes that it lacks any authority to extend that filing period no matter what the circumstances. In other words, the HRC believes that the 14-day period is jurisdictional.

BNSF filed a Petition for Judicial Review, or, Alternatively, Petition for Writ and/or Declaratory Judgment (BNSF's "Petition"). *See* Ex. "B". Crucially, BNSF did not seek review of the underlying Hearing Officer's Decision but sought review only of the HRC Dismissal Order, which BNSF believes is erroneous because recent decisions of this Court demonstrate that the 14-day period at issue is not jurisdictional but may be extended on equitable grounds. As authority to review the HRC Dismissal Order, BNSF relied on Mont. Code Ann. § 2-4-701, § 2-4-702, the Uniform Declaratory Judgments Act, Mont. Code Ann. § 27-8-101

et. seq., and the district court's jurisdiction to issue a writ of mandate, writ of review, or other appropriate writ. *Id.*, ¶¶ 13-18.

Cringle and the Department moved to dismiss arguing that the District Court lacked jurisdiction over BNSF's Petition. They also filed their own petitions for enforcement of the underlying Hearing Officer's Decision. The District Court granted the motions to dismiss for lack of jurisdiction. *See* Order (March 15, 2010) (attached as Ex. "C"); *Nunc Pro Tunc* Order (March 29, 2010) (attached as Ex. "D"). Because it believed that it lacked jurisdiction over BNSF's Petition, the District Court also summarily granted the petitions to enforce and entered a Judgment awarding relief against BNSF on April 9, 2010. *See* Judgment (attached as Ex. "E"). BNSF has appealed the dismissal of its Petition and the granting of the petitions to enforce and resulting Judgment.

BNSF filed a Motion for Stay of Execution of Judgment Pending Appeal and Request for Approval of Supersedeas Bond and Brief in Support. *See* Ex. "F". Cringle objected, *see* Ex. "G", and BNSF replied, *See* Ex. "H". The Department did not respond. On May 21, 2010, the District Court denied BNSF's requests. *See* Order on Mot. Stay Execution (attached as Ex. "I").

Argument

I. THE DISTRICT COURT'S ORDER VIOLATES RULE 22(1)(d).

Rule 22(1)(d), M.R.App.P requires that the District Court states its rationale in ruling on a motion to stay and for approval of a supersedeas bond:

The district court must promptly enter a written order on a motion filed under this rule and include in findings of fact and conclusions of law, or in a supporting rationale, the relevant facts and legal authority on which the district court's order is based.

The District Court did not comply with that rule but stated only its decision that BNSF's motion "is DENIED." Accordingly, BNSF cannot counter the District Court's specific rationale for denying BNSF's request for stay of execution of judgment and request for approval of supersedeas bond.

BNSF believes that even without the District Court's rationale, it has established good cause for this Court to grant a stay. Should this Court disagree, however, it should at a minimum temporarily stay enforcement of the Judgment, order the District Court to comply with Rule 22(1)(d), and allow BNSF to then re-submit this motion.

II. GOOD CAUSE EXISTS TO GRANT BNSF'S STAY REQUEST AND REQUEST FOR APPROVAL OF SUPERSEDEAS BOND.

Upon a showing of good cause and in the interests of justice, this Court may grant, modify, or deny the relief requested from the District Court under Rule 22(2), M.R.App.P. Rules 22(2)(a)(i) & 22(3), M.R.App.P. Here, there is good cause for a stay and the interests of justice overwhelmingly support a stay.¹ See Aff. Benjamin O. Rechtferdig (May 28, 2010) (attached as Ex. "J").

¹ In his response to BNSF's motion to stay, Cringle argued that since the District Court concluded it lacked subject matter jurisdiction to consider BNSF's Petition, it therefore lacked jurisdiction to grant BNSF's stay request. Cringle's Obj. to Stay, 1-2. To the extent he may repeat that argument here, the Court should reject

First, Cringle's monetary interests are fully protected, and neither Cringle nor the Department will be prejudiced if the stay and supersedeas requests are granted. The Judgment awards Cringle back pay, front pay, lost fringe benefits, emotional distress damages, and statutory interest accrued thereon. The Judgment also provides for post-judgment interest at the rate of 10%, *see* Judgment, p. 2, a rate that the Court surely knows is much higher than any prevailing market rate. That interest serves its purpose of protecting Cringle against any delay in recovery caused by an appeal.

There is no valid concern about BNSF's ability to pay. BNSF is a large company with sufficient assets to pay the judgment. Moreover, as a measure of security, BNSF obtained a supersedeas bond in the amount of \$293,150.54, which is the total amount due Cringle, including interest, according to the Judgment, as of March 30, 2011 (exactly one year after the filing of BNSF's original Notice of Appeal). *See* Supersedeas Bond (attached as Ex. "K"). BNSF believes this amount is sufficient. Because the District Court did not explain its rationale for

it. The District Court's jurisdictional ruling on BNSF's Petition led the District Court to grant Cringle's and the Department's petitions to enforce, which in turn led to the Judgment against BNSF. It is the Judgment BNSF seeks to stay and supersede not the District Court's order dismissing BNSF's Petition. Cringle obviously does not argue that the District Court lacked jurisdiction over the petitions to enforce. As such, the District Court's (incorrect) ruling that it lacked jurisdiction over BNSF's Petition has no bearing on BNSF's ability to supersede enforcement of the Judgment awarding affirmative relief to Cringle and the Department.

denying the motion as required by the Rules, BNSF does not know if it had a concern about the adequacy of the bond. As it offered in the District Court, however, BNSF stands ready to obtain a revised bond in an amount directed by the Court if the Court has any concern about the adequacy of the amount.

Second, should Appellees be allowed to execute on the Judgment pending appeal and BNSF prevail on the instant appeal, BNSF will be in the position of having to try to collect the sums paid to Cringle and “undo” the injunctive relief awarded the Department. “Unringing the bell” is a practical impossibility in this situation. The recovery of money paid out to Cringle would be a slim prospect at best, as Cringle would be under no obligation to retain the funds pending the appeal.

Third, BNSF has good grounds for its appeal. BNSF’s appeal challenges the District Court’s remarkable conclusion that it lacked jurisdiction over BNSF’s Petition, which sought review of the HRC Dismissal Order. Critically, the District Court focused on the wrong order in making its decision. Specifically, the District Court dismissed BNSF’s Petition based on its view that it lacked jurisdiction to review the Hearing Officer’s Decision. That reasoning overlooked that BNSF was not seeking review of the Hearing Officer’s Decision but was seeking review of the HRC Dismissal Order.

BNSF never requested the District Court to review the Hearing Officer’s Decision and agrees that the District Court, at this time, could not review the

Hearing Officer's Decision because BNSF, as a result of the HRC Dismissal Order, has not yet exhausted its administrative remedies with respect to the Hearing Officer's Decision. It is, in fact, precisely exhaustion of remedies that BNSF seeks in this matter — the opportunity for the HRC to review the Hearing Officer's Decision.

There is no question that the District Court had jurisdiction to review the HRC Dismissal Order under one or more of the grounds BNSF relied on for such review.² The HRC Dismissal Order determined that the HRC lacked authority to extend or excuse noncompliance with the 14-day filing period for seeking review by the HRC of a Hearing Officer's decisions and thus treated the 14-day filing period as jurisdictional. The Department has confirmed that view in its briefing to the District Court. The notion that an agency could dismiss a party's internal appeal but no court could review the agency's dismissal order is extraordinary. Indeed, the District Court reached a contrary ruling only because it confused

² Those grounds are: (a) Mont. Code Ann. § 2-4-702, which provides for review of a final agency decision, such as the HRC Dismissal Order; (b) Mont. Code Ann. § 2-4-701, which permits review of a "procedural . . . agency action or ruling . . . if review of the final agency decision would not provide an adequate remedy" such as the portion of the HRC Dismissal Order that denies BNSF's motion to extend the 14-day filing period; (c) declaratory relief regarding the HRC's ability to extend or excuse noncompliance with the 14-day period; and (d) the District Court's jurisdiction to issue a writ of mandate, writ of review, or other appropriate writ to correct the HRC's legally incorrect view about the 14-day period. See Mont. Code Ann. §§ 27-25-102, 27-26-102, 27-8-201.

BNSF's request for review of the HRC Dismissal Order with a request for review of the underlying Hearing Officer's Decision.

Moreover, the District Court's apparent view that the 14-day filing period is jurisdictional does not justify its dismissal of BNSF's Petition. Instead, whether the 14-day filing period is jurisdictional is the merits issue in BNSF's Petition. A court's view that a party's claim may fail on the merits does not permit dismissal for lack of jurisdiction.

Finally, the merits issue — whether the HRC has the authority to extend or excuse noncompliance with the 14-day filing period for seeking review by the HRC of a Hearing Officer's decision — is a question of first impression for this Court and one on which BNSF has strong arguments in its favor. Specifically, this Court has joined a growing trend of decisions that decline to treat various filing periods and other procedural requirements as jurisdictional. *E.g., Davis v. State*, 2008 MT 226, 344 Mont. 300, 187 P.2d 654, ¶¶ 16-17 (one-year time bar on post-conviction relief set out in Mont. Code Ann. § 46-21-102 not jurisdictional).³

³ See also *Miller v. 18th Jud. Dist. Ct.*, 2007 MT 149, 337 Mont. 488, 162 P.3d 121, ¶¶ 43-46 (rule requiring notice of the state's intent to seek the death penalty within 60 days after arraignment not jurisdictional); *Union Pacific R. Co. v. Locomotive Engineers and Trainmen Gen. Comm. of Adjustment, Central Region*, 130 S.Ct. 584, 596-99 (2009) (requirement in federal NRAB proceeding to demonstrate that an informal conference had taken place before filing the proceeding not jurisdictional); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (requirement to file a timely charge of discrimination with the federal Equal Employment Opportunity Commission not jurisdictional but subject to equitable modification).

Like the provisions in those cases and others that BNSF will cite in its brief to this Court, the 14-day filing period is not a limit on a District Court's jurisdiction but is instead a claim-processing rule. Indeed, the rule literally is a claim-processing rule because it deals with the internal processing of a claim through an administrative agency. It is not, as Cringle no doubt will seek to portray it, akin to a deadline to appeal from a District Court to a court of appeals. Nor is it even a deadline to file a petition for review with a District Court seeking judicial review of an agency decision. Accordingly, BNSF ultimately will ask this Court to hold, as it has regarding other procedural requirements, that the 14-day provision is not jurisdictional but is subject to extension for equitable reasons or as permitted in the applicable agency administrative rules for extensions of other filing periods.⁴

Conclusion

BNSF respectfully requests this Court grant its request for a stay of execution of judgment pending appeal and approval of supersedeas bond.

DATED this 28th day of May, 2010

⁴ See Rule 24.9.113(3), ARM ("Except as to dates fixed by statute **and not subject to modification**, the commission may enlarge the time to perform an act.") (emphasis added).

By: _____

Benjamin O. Rechtfertig

CERTIFICATE OF SERVICE

I do hereby certify that I have served a true and correct copy of the foregoing upon individual(s) listed below by the following means:

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